

APPEAL NO. 020688
FILED MAY 16, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on February 28, 2002. The hearing officer resolved the disputed issues before him by determining that the respondent (claimant) sustained a compensable repetitive trauma injury; that the date of injury is _____; and that the appellant (carrier) is not relieved from liability under Section 409.002, because the claimant timely notified her employer pursuant to Section 409.001. The carrier has appealed these determinations. The file contains no response from the claimant.

DECISION

Affirmed in part; reversed and rendered in part.

At the hearing, the claimant was faced with the difficult problem of proving her date of injury and the fact that she timely reported the injury to her employer. At the hearing, the claimant contended that she sustained a compensable repetitive trauma injury on _____, the date she stated on her Employee's Notice of Injury or Occupational Disease & Claim for Compensation (TWCC-41) after changing it from _____. Also in evidence was an Employee's Injury/Accident Report dated April 20, 2001, listing the date of injury as _____. At the hearing, it was the claimant's contention that the date of her repetitive motion injury was _____; however, in a repetitive trauma injury case, the date of injury is the date the claimant first knew or should have known the injury may be related to her employment, not necessarily the date contained on an accident/injury report.

Unfortunately, in the instant case, the claimant had no accurate recollection of when her symptoms first appeared or when she first knew or should have known that they were work related; thus, failure of proof necessitates a reversal. The claimant testified that she thought she first felt symptoms sometime in _____ and that she reported this to her employer, who performed an ergonomic adjustment to her workstation shortly thereafter. The claimant repeatedly stated that she could not remember the exact date the symptoms appeared nor when she reported them to her employer. At times in her testimony, the claimant stated that she thought her job was causing the pain as soon as it appeared, and at other times she stated that she did not know she had a work-related injury until _____. When the claimant was asked how long her hands had been hurting prior to reporting the problem to her employer in _____, she testified that it could have been as long as a month or as short as a week. The claimant stated that she could not give any time frames. In his statement of the evidence, while discussing the date of injury, the hearing officer observed that the "Claimant reasonably should have known her upper extremity symptoms may have been related to her employment as soon as the symptoms appeared." He further stated that, in regard to when the symptoms first appeared, that "[t]he best Claimant could recall was some time in _____."

The burden is on the claimant to prove that an injury occurred within the course and scope of employment. Service Lloyds Insurance Co. v. Martin, 855 S.W.2d 816 (Tex. App.-Dallas 1993, no writ); Texas Employers Insurance Association v. Page, 553 S.W.2d 98 (Tex. 1977). The CCH is not an investigative tribunal; it is incumbent upon the claimant to come prepared with testimony and records probative of the fact that an injury occurred, as well as the date it occurred. We have stated before that a specific date of injury is needed for further action on a claim. Texas Workers' Compensation Commission Appeal No. 94896, decided August 25, 1994. It is reversible error for a hearing officer to find an entire month as a date of injury. Texas Workers' Compensation Commission Appeal No. 941374, decided November 23, 1994. This is especially true when timely notice to an employer is in issue. Texas Workers' Compensation Commission Appeal No. 941505, decided December 22, 1994. However, where the claimant will not be, or cannot be, more specific, or offer evidence supportive of a specific date that could be found by a hearing officer, there is a failure to prove an essential element of the claimant's case. The failure of the claimant, over a year after the claimed events took place, to have reconstructed at least a probable date of injury at the time of the CCH, results in the claimant's failure to prove an essential element of her case. See Texas Workers' Compensation Commission Appeal No. 962018, decided November 25, 1996. In the instant case, the claimant was well aware at the benefit review conference that the date of injury was in dispute and yet she presented no specific evidence at the CCH as to the precise date. Upon careful review of the record, we decline to remand this case back to the hearing officer as the evidence presented at the hearing cannot support a finding of a specific date of injury.

We affirm the hearing officer's findings that the claimant sustained damage or harm to the physical structure of her body as a result of repetitious, physically traumatic activities that occurred over time and arose out of and in the course and scope of her employment with the employer and that the claimant gave notice to the employer of the claimed injury within 30 days after she first noticed any symptoms or problems involving either or both of her upper extremities. We also confirm the determination that the carrier is not relieved of liability under Section 409.002, because the claimant did timely notify her employer pursuant to Section 409.001. However, because we find that the claimant has failed to meet her burden of proof as to the date of the injury, the hearing officer's determinations that the claimant sustained a compensable repetitive trauma injury and that the date of injury is _____ are reversed and a new decision is rendered that the claimant did not sustain a compensable repetitive trauma injury because she failed to meet her burden of proving the date the injury occurred.

The true corporate name of the insurance carrier is **AMERICAN HOME ASSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY
800 BRAZOS SUITE 750, COMMODORE 1
AUSTIN, TEXAS 78701.**

Daniel R. Barry
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Philip F. O'Neill
Appeals Judge